In the

Supreme Court of the United States

October Term, 1957

No. 18

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Appellee, and THE UNITED STATES OF AMERICA, Intervenor

On Appeal From the United States Court of Appeals For Sixth Circuit

No. 36

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Petitioners,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Respondent, and THE UNITED STATES OF AMERICA, Intervenor

On Writ of Certiorari To the United States Court of Appeals For the Sixth Circuit

BRIEF OF AMICUS CURIAE ON BEHALF OF CITY OF KENOSHA (WISCONSIN)

ROBERT V. BAKER
Kenosha National Bank Building
Kenosha, Wisconsin
City Attorney and Counsel of Record for City of Kenosha

WM. J. P. ABERG
16 North Carroll Street
Madison 3, Wisconsin

CHARLES P. SEIBOLD
16 North Carroll Street
Madison 3, Wisconsin

Counsel for City of Kenosha

THE GILMAN PRESS, MADISON, WISCONSIN

INDEX

CITATIONS

Cases:

Texts:

In the

Supreme Court of the United States

October Term, 1957

No. 18

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Appellee, and THE UNITED STATES OF AMERICA, Intervenor

---

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR SIXTH COURT

No. 36

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, Petitioners,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Respondent, and THE UNITED STATES OF AMERICA, Intervenor

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE ON BEHALF OF CITY OF KENOSHA (WISCONSIN)

OBJECT OF THIS BRIEF

This brief amicus curiae is filed pursuant to Rule 42-4 by the City of Kenosha, a political subdivision of the State of Wisconsin, in support of Appellants, City of Detroit and County of Wayne.

NATURE OF CITY'S INTEREST

The City of Kenosha is respondent in No. 343, *American Motors Corporation et al. vs. City of Kenosha*, presently pending before this court on motion to affirm or dismiss the appeal. The issues in that case are related to the issues in the present case.

RESTATED QUESTIONS

The City of Kenosha believes that the decision in the instant case is governed by the following questions:

(1) Were Michigan personal property taxes levied on an ownership interest of the United States?

The Court of Appeals (6th Circuit) answered yes.

(2) If the answer to question 1 is "yes," then in what articles of personal property did the United States have an ownership interest?

Not answered by the Court of Appeals.

ARGUMENT

I.

PROPERTY OWNED BY A PRIVATE CONTRACTOR AND USED IN PERFORMING SERVICES FOR THE FEDERAL GOVERNMENT IS SUBJECT TO STATE AND LOCAL AD VALOREM TAXES

This principle was established early in the history of the Federal Constitution and has never been seriously questioned. For a discussion of this rule, see: *Anno.*, "Immunity from State Taxation of Independent Contractors with United States or Federal Agencies—Supreme Court cases," 96 L. Ed. 263, at 268; *James v. Dravo Contracting Company* (1937), 302 U. S. 134, 153-61.

Furthermore, the fact that the economic burden of the tax may be passed on to the Federal Government—as in the instant case—is immaterial. *Alabama v. King and Boozer* (1941), 314 U. S. 1, 8-9.

II.

TAXABILITY IS DETERMINED BY OWNERSHIP AND NOT "TITLE"

This court has consistently held that federal immunity from local *ad valorem* taxes depends upon the government's "ownership interest" rather than title. *Offutt Housing Company v. Sarpy County* (1956), 351 U. S. 253, 261-2 (Footnote 1); *S. R. A. Inc. v. Minnesota* (1946), 327 U. S. 558; *United States v. Allegheny County* (1944), 322 U. S. 174, 187. Consider the following:

"Labeling the Government as the 'owner' does not foreclose us from ascertaining the nature of the real interests created * * *. The Government may have 'title,' but only a paper title * * *." *Offutt Housing Co. v. Sarpy County, supra,* at 261.

"It [federal immunity] should be sufficiently flexible to subject real private rights, disentangled from federal policies, to state taxation * * *. Ownership of the beneficial interest has passed to the petitioner with legal title retained by the United States for security purposes." *S. R. A. Inc. v. Minnesota, supra,* at 569-70.

"We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner." *United States v. Allegheny County, supra,* at 187.

The same rule has been applied in other fields of taxation. See: *Corliss v. Bowers* (1930), 281 U. S. 376, 377-8; *Helvering v. Clifford* (1939), 309 U. S. 331, 335, 337.

III.

OWNERSHIP IN THE PRESENT CASE WAS IN THE CONTRACTOR, NOTWITHSTANDING TRANSFER OF "TITLE" THE UNITED STATES

Property, in the legal sense, means not the thing itself, but rather the *incidents of ownership* which inhere in it. *Brown on Personal Property (Second Edition)*, Sec. 5 (pp. 6-7); *42 Am. Jur. 189, 217,* (Property, Secs. 4, 40).

Under the procurement contract in the instant case, Murray Corporation retained substantially all incidents of ownership in the property in question (i.e. raw materials,

supplies, work in process, and completed parts), including the risk of loss and rights of possession, use and disposition. In other words, notwithstanding the passage of "title," the contract so effectively reserved all incidents of ownership to the contractor that the government acquired no substantial ownership interest. The fact that the government acquired "title" and contractual controls "as a regulatory mechanism" does not in itself create an ownership interest. *Offutt Housing Company v. Sarpy County* (1956), 351 U. S. 253, 261; *S. R. A. Inc. v. Minnesota* (1946), 327 U. S. 558.

In order for the government to acquire a true ownership interest, its "title" must be buttressed by some of the normal incidents of ownership as was the situation in *United States v. Allegheny County* (1944), 322 U. S. 174. In that case, the government—and not the contractor—retained the risk of loss and right of disposition. Thus, 42 *Am. Jur.* 215 (Property, Sec. 37) states that:

> "He is the owner of property who, in the case of its destruction, must sustain the *loss* of it" (italics added).

In addition to vesting the contractor with practically all incidents of ownership, the procurement contract in the present case even contained a reversion of "title" clause in respect to property not delivered to and accepted by the government. It is obvious that the government never intended to acquire ownership of materials, supplies, work in process, and parts *unless* and *until* they were incorporated into finished products and accepted by government inspectors.

IV.

THE PURPOSE AND EFFECT OF THE PROCUREMENT CONTRACT WAS TO GIVE THE GOVERNMENT NO MORE THAN A *SECURITY* TITLE

An exhaustive article on government supply contracts appears in *26 Fordham L. Rev. 224* under the title of "Government Supply Contracts: Progress Payments Based on Costs; The New Defense Regulations." The author, Professor John W. Whelan,* was an instructor in the Army's Judge Advocate General School at Charlottesville, Virginia, from 1951 to 1955 and was principal author of the Army Special Text, "Army Procurement Law, 1955."

As shown by Professor Whelan's article, the purpose of progress and partial payments, such as were used in the instant case, is to provide *financing* for the contractor (pp. 225-7 of *26 Fordham L. Rev.*). Under long-established rules and regulations, a paramount lien or "title" is customarily granted to the government (pp. 231-3 of *26 Fordham L. Rev.*). This procedure is designed to protect the government "against the danger of loss of appropriated funds * * *" (p. 232 of *26 Fordham L. Rev.*, Footnote 34).

After a detailed analysis of "title-vesting" and related contract clauses (substantially the same as those in the instant case), Professor Whelan states:

> "One is prone to conclude that the Government's title is a tentative one, something more nearly a *security* device than the title of an owner" (p. 256 of *26 Fordham L. Rev.*, italics added).

---

*Assistant Professor of Law, University of Wisconsin, School of Law.

> "The analysis of subparagraph (d) [of the Progress Payments clause] * * * seems to be weighted on the side of a declaration that the government acquired no title (except perhaps some sort of *security* interest) to property subject to the 'Progress Payment' clause. To this conclusion the author inclines" (p. 263 of *26 Fordham L. Rev.*, italics added).

The Court of Appeals of the Second Circuit has referred to the government's claim of "title" under such a clause as

> "Essentially, the enforcement of an *equitable* lien on the defendant's property" (*United States v. Lennox Metal Manufacturing Company* [1955 CA-2], 225 F. 2d 302, 317).

The acquisition of security title by the government does not, of course, create an "ownership interest" in the government so as to preclude local taxation. *S. R. A. Inc. v. Minnesota* (1946), 327 U. S. 558.

V.

THE WISCONSIN SUPREME COURT CORRECTLY DETERMINED SIMILAR ISSUES IN *AMERICAN MOTORS CORP., ET AL. V. CITY OF KENOSHA* (1957), 274 Wis. 315, 80 N. W. 2d 363

In that case, now pending in this court (No. 343) on motion to affirm or dismiss, the Wisconsin Supreme Court determined the effect of "title-vesting" clauses similar to those found in the instant case. After determining that Federal and Wisconsin law are alike on this question (p. 320 of 274 Wis.), the Wisconsin court applied the rule of

Offutt Housing Company v. Sarpy County (1956), 351 U. S. 253, 261, that the court may disregard a paper title and ascertain the "nature of the real interests created." It found that the contractor had retained substantially all incidents of ownership and was the true owner for local property tax purposes, notwithstanding the passage of "title."

VI.

CONSUMABLE MATERIALS ARE TAXABLE IN ANY EVENT

If the court recognizes an "ownership interest" in the government—a recognition which we contend cannot be given under the facts—then we submit that the equipment and materials used by the contractor and not incorporated into the finished product are taxable in any event. The full economic use of such items is vested in the contractor and will never be turned over to the government. The government has acquired "title" to these *excess* items solely as a *security* device. As such, it acquired no "ownership interest." See *Offutt Housing Company v. Sarpy County* (1956), 351 U. S. 253, where a private ownership was established for local tax purposes on the basis of a 75-year leasehold interest in housing units having a 35 year life.

VII.

CONCLUSION

The decision of the lower court should be reversed.

Respectfully submitted,

ROBERT V. BAKER
Kenosha National Bank Building
Kenosha, Wisconsin

City Attorney and Counsel of Record for City of Kenosha

WM. J. P. ABERG
16 North Carroll Street
Madison 3, Wisconsin

CHARLES P. SEIBOLD
16 North Carroll Street
Madison 3, Wisconsin

Counsel for City of Kenosha